No. SC85124

IN THE
MISSOURI SUPREME COURT

ROSS S SWANBERG,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

Appeal from the Taney County Circuit Court
The Honorable Michael Merrell, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the judgment of the Taney County Circuit Court reinstating the driving privileges of respondent Ross S. Swanberg. Pursuant to § 302.311, RSMo. 2000, appeals from the judgment of the circuit court in driver's license cases may be taken as in civil cases. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of this Court. Therefore, jurisdiction originally lay in the Missouri Court of Appeals, Southern District. Mo. Const., Art. V, § 3; § 477.060, RSMo. 2000. This Court, having ordered transfer, has jurisdiction pursuant to Mo. Const., Art. V, § 10.

STATEMENT OF FACTS

At 4:34 a.m. on July 1, 2001, Missouri State Trooper Windle was notified of an accident on Missouri Highway 76 (Legal File ("LF") 16). Trooper Windle recorded the time of the accident as 4:20 a.m. (LF 13, 17). By the time he arrived on the scene at 4:46, the driver had already left the vehicle (LF 16.). Trooper Windle determined that respondent Swanberg owned the vehicle, and that the vehicle had gone "around the curve over the centerline" (LF 16-18).

At 5:23, Trooper Windle located Ross Swanberg at a nearby "Primetime" store (LF 16). Swanberg told Trooper Windle that "he was going around the curve in his lane and overcompensated" (LF 16). Swanberg "was very unsteady on his feet and his speech was slurred" (LF 16). Trooper Windle administered three field sobriety tests: gaze nystagmus, finger to nose, and one leg stand; Swanberg failed all three and refused to perform a fourth, repeating a portion of the alphabet (LF 13, 16). Swanberg said he was "going around the curve in his lane and overcompensated" (LF 16). When the trooper said that he had instead crossed the certerline, Swanberg "became angry" (LF 16).

Trooper Windle arrested Swanberg and took him to the Taney County Jail (LF 16). On the way, Windle tried to show Swanberg his tire marks (LF 16). Swanberg responded with profanity (LF 16). Swanberg also told a new story: that a large buck ran in front of him (LF 16, 18).

At the jail, Trooper Windle advised Swanberg of the implied consent law (LF 15, 16). He then asked Swanberg to perform a breath test; Swanberg refused (LF 15, 16).

The Director revoked Swanberg's license for one year (LF 12). Swanberg petitioned for review in the circuit court of Taney County (LF 3-4).

At the hearing in the circuit court, the Director introduced the administrative file – including Trooper Windle's report – into evidence (LF 12-22; *see* Tr. 2-3, 16).

Swanberg responded by testifying. He asserted that the accident occurred at 3:30 a.m., and that he was neither intoxicated nor under the influence of drugs or narcotics at the time (Tr. 4-5). He testified that he went to Primetime to call for a tow truck, but that there was a delay in getting a tow (LF 6-7). Swanberg said that he left the store, and "ended up drinking and carrying on for a couple hours" (Tr. 7). He then returned to the store (Tr. 7). By that time, he testified, he was intoxicated (Tr. 7).

Swanberg did not testify concerning anything he said to Trooper Windle. In fact, his entire testimony about his interaction with the trooper comprises a few lines:

> A. . . . I was riding with some other friends and we come back to the Prime Time [the Primetime] and they wanted to stop and get some cigarettes or something, and then that's when the highway patrol pulled up and had said– knew that it was my car because he had run a check or something. And by that time that's when I got arrested.
>
> Q. Okay. And you were arrested, it look like it says here, about 5:23 in the morning; is that about right?
>
> A. That sounds about right.

Q. Okay. But at the time you were arrested you're not disputing that you were, in fact, probably intoxicated?

A. No, I was intoxicated at that time.

(Tr. 7).

Swanberg also presented the testimony of Jason Bright, a clerk at Primetime, where Trooper Windle found Swanberg. Bright testified that Swanberg was in the store twice – the first time he was not intoxicated, but the second time, when Trooper Windle found him, he was intoxicated (Tr. 10-12). Like Swanberg, Bright said nothing about conversations with Windle. Instead, he merely confirmed that Swanberg appeared intoxicated when Trooper Windle arrested him (Tr. 11-12).

On July 17, 2002, the circuit court found that Trooper Windle lacked probable cause to arrest Swanberg at the time of the arrest (LF 23). The court ordered the Director to reinstate Swanberg's driving privileges and remove the revocation from his driving record (LF 23).

On March 11, 2002, the Director appealed to the Missouri Court of Appeals, Southern District (LF 25-26). On January 14, 2003, that court reversed the decision of the circuit court and remanded the case with instructions to reinstate the Director's revocation. This court then granted Swanberg's application for transfer.

POINT RELIED ON

The trial court erred in reinstating the driving privileges of Swanberg based on the conclusion that the arresting officer lacked probable cause, because its judgment is against the weight of the evidence showing that the officer had probable cause and is unsupported by substantial evidence in that the officer knew that Swanberg was driving and that while driving he was involved in a single-vehicle accident, that Swanberg manifest signs of intoxication, and that the officer had no knowledge of Swanberg's drinking after the accident.

Hinnah v. Director of Revenue, 77 S.W.3d 616 (Mo. banc 2002)

Riche v. Director of Revenue, 987 S.W. 2d 331 (Mo. banc 1999)

*Bollinger v. Director of Revenue***,** 39 S.W.3d 64 (Mo. Ct. App. E.D. 2001)

Hopkins-Barken v. Director of Revenue, 55 S.W.3d 882 (Mo. Ct. App. E.D. 2001)

§ 577.041, RSMo. 2000

ARGUMENT

The trial court erred in reinstating the driving privileges of Swanberg based on the conclusion that the arresting officer lacked probable cause, because its judgment is against the weight of the evidence showing that the officer had probable cause and is unsupported by substantial evidence in that the officer knew that Swanberg was driving and that while driving he was involved in a single-vehicle accident, that Swanberg manifest signs of intoxication, and that the officer had no knowledge of Swanberg's drinking after the accident.

A. Standard of Review

The standard of review for this court-tried civil case is set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976): "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *See Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). Where "the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment." *Id*.

B. The decision to revoke for refusing a test must be upheld if the evidence shows that officer had probable cause to arrest the driver.

Section 577.041.1, RSMo. 2000, instructs the Director to revoke a license for refusing to take a breath test. The statute then provides for judicial review of the revocation, setting out the questions to be decided by the circuit court:

> At the hearing, the court shall determine only: (1) Whether or not the person was arrested . . . ; (2) Whether or not the officer had: (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; . . .and (3) Whether or not the person refused to submit to the test.

§ 577.041.4, RSMo. 2000. *See Hinnah v. Director of Revenue*, 77 S.W.3d at 620.

Here, there was never any issue as to the first and third points. Swanberg conceded at the hearing in the circuit court that he was arrested (Tr. 7). He did not contest the evidence in the administrative record that he refused testing (LF 15).

The trial court reversed the Director's revocation solely on the grounds that the trooper did not have probable cause to arrest Swanberg for driving while intoxicated (LF 29). "Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." *State v. Tokar*, 918 S.W. 2d 753, 767 (Mo. banc 1995), quoted with approval, *Hinnah*, 77 S.W. 3d at 621. Probable cause may be based on a variety of information before the officer, including circumstantial evidence and statements from other officers and eye witnesses. *Bollinger v. Director of Revenue*, 39 S.W.3d 64, 65 (Mo. Ct. App. E.D. 2001) ("An officer may have reasonable grounds to arrest for driving while intoxicated, even when the evidence of 'actually driving' is based on

circumstantial evidence."); *Hopkins-Barken v. Director of Revenue*, 55 S.W.3d 882, 885 (Mo. Ct. App. E.D. 2001) ("Information given by eyewitnesses to the arresting officer directly, or through other officers, even if hearsay, is admissible to establish probable cause because it is not offered for its truth, but to explain the basis for a belief that probable cause to arrest existed.").

C. Undisputed evidence before the circuit court showed that the trooper had probable cause to believe that Swanberg was driving and that he was intoxicated.

The question, then, is whether the circuit court had sufficient basis for finding the picture before Trooper Windle at the time he arrested Swanberg was not sufficient to warrant a prudent person to believe that Swanberg had been driving while intoxicated. Because there is no dispute about the facts that formed that picture, there is no need to defer to the trial court's judgment. *See Hinnah*, 77 S.W. 3d at 620.

Swanberg has never suggested that Trooper Windle lacked probable cause to believe that he was driving. In fact, he conceded to Trooper Windle that he was driving – though he gave conflicting stories about just what kind of error he made while driving.

And Swanberg has expressly conceded that he was intoxicated when Officer Swanberg found him (Tr. 7). He even presented a second witness to that fact (Tr. 11-12).

Trooper Windle, then, had Swanberg's express statement that he had been driving when the accident occurred. And he had considerable objective evidence that Swanberg was

intoxicated. That is enough to give him probable cause – unless there was some other, countervailing evidence. Here, there was not.

Swanberg's counsel, arguing to the circuit court, pointed to two pieces of evidence that in his view colored the picture seen by the Trooper in a way that precluded his finding of probable cause. From Swanberg's testimony, he pointed to the statement that the accident occurred at 3:30 a.m. – two hours before the arrest.[1] And from the testimony of Swanberg and Bright, he pointed to evidence that Swanberg was not intoxicated when he first came into the store, though he was intoxicated the second time, when he was arrested. But the testimony on both points is entirely irrelevant here.

As noted above, probable cause is judged according to what the officer knew at the time of the arrest. Swanberg presented no evidence that Trooper Windle was told or otherwise knew that the accident occurred at 3:30. He presented no evidence that Trooper Windle was told or otherwise knew that Swanberg began drinking after his first visit to the store. In other words, he left the record as set out by Trooper Windle: a report of a 4:20 accident, received at 4:34; finding Swanberg intoxicated at 5:23; and Swanberg's concession that he was driving the vehicle at the time of the accident (LF 16). That should be enough to establish probable cause.

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[1] Swanberg's counsel invoked "the hour and a half rule" (Tr. 15). There is no such rule in any Missouri statute.

D. The Director's showing of probable cause is sufficient, in a case where the arresting officer had no evidence of post-accident drinking, despite a delay of 63 minutes between the accident and finding the intoxicated driver.

As noted above, under *Hinnah*, the Director is responsible for showing that the officer had probable cause to arrest the driver. 77 S.W. 3d at 620. In the circuit court, in the court of appeals, and in his application for transfer, Swanberg argued that the Director failed to make that showing here – despite the undisputed evidence that he was driving and intoxicated – merely because of the delay between the accident and the time at which the officer found the driver. There may be some point at which delay alone is enough to impose an additional burden of proof on the Director. But the Director's evidence was sufficient in this case.

Swanberg does not go so far as to make the argument that the Director must prove the driver did not drink after the accident in every instance in which the officer does not come upon the driver until after the accident. Officers often locate drivers some time after their vehicles have stopped. Sometimes the drivers are still in the vehicles, but often – as shown by the precedents Swanberg has cited, discussed below – the drivers are elsewhere.

Unable or unwilling to argue for requirement that the Director always prove what happened before the driver is apprehended, Swanberg has, in the courts below and in his application for transfer, identified three cases in which the effect of delays was among the issues discussed, and has argued that some delays require additional proof.

The most recent is the Western District's decision in *Nightengale v. Director of Revenue*, 14 S.W.3d 267 (Mo. Ct. App. W.D. 2000). There the court found, consistent with this court's holding in *Hinnah*, that the Director did not carry her burden in a case where "the driver of the vehicle had left the scene" of an accident before the officers arrived. *Id*. at 270. But the evidence presented lacked evidence comparable to the evidence before the circuit court here. The officer who arrested Nightengale did not testify, nor was his report admitted into evidence. *Id*. at 268-69. "No evidence was offered regarding the length of delay between the accident from which Ms. Nightengale purportedly fled and her arrest or where she was or what she was doing when arrested." *Id*. at 270. *Nightengale* might require that the Director present some evidence that the accident and the apprehension of the driver occurred within some reasonable period. But nothing in *Nightengale* suggests that when the record shows a delay of 63 minutes (or even 113 minutes, if Swanberg's testimony at trial could retroactively replace the shorter period in Trooper Windle's mind), is so long that the Director is obligated to specially account for Swanberg's actions during that period.

The Eastern District's earlier decision in *Howard v. McNeill*, 716 S.W. 2d 912 (Mo. Ct. App. E.D. 1986), highlights what someone like Howard and Swanberg should do if they want to dilute the apparent evidence of driving while intoxicated. The delay in apprehending the driver there was similar to the delay here: the officer found the driver 50-60 minutes after the accident. *Id.* at 913. Howard, like Swanberg, later claimed that he became intoxicated after the accident. But when he was apprehended, Howard, like

Swanberg, "failed to offer the potentially exculpatory fact of [his] heavy drinking after the collision" to the arresting officer. *Id.* at 915. So the officer who arrested Howard, like Trooper Windle, had no basis for believing that Howard became intoxicated only after he drove. If Howard and Swanberg wanted to dilute the officer's basis for probable cause, they needed to provide him, before arrest, with evidence that they were intoxicated because of post-accident drinking. The officer would then have been required to consider that possibility – but at a time when he could have investigated it, such as by questioning witnesses with contemporary knowledge.

The only decision Swanberg has cited for a blanket rule is a pre-*Nightengale* Western District decision, *Domsch v. Director of Revenue*, 767 S.W. 2d 121 (Mo. Ct. App. W.D. 1989). The accident there occurred at 1:15 a.m.; the officer arrived on the scene at 1:35 a.m.; and the officer found the driver "[a]t approximately 2:55 a.m., one hour and forty minutes after the initial accident," with "no alcoholic beverages in his presence," having "eaten a meal" in a restaurant that "did not serve alcoholic beverages." *Id*. at 122, 124. According to the Western District in *Domsch*, the delay alone was sufficient to defeat the showing of probable cause. In that court's view, the Director bears the burden of proving that the driver did not take advantage of the "mind boggl[ing]" range of "opportunities [Domsch] had for obtaining alcohol in the intervening hour and forty minutes." *Id*. at 124. But it is the *Domsch* rule that boggles the mind.

The *Domsch* rule cannot be reconciled with the purpose of the revocation law: "to protect the public by quickly removing drunken drivers from Missouri's roads and

highways." *Riche v. Director of Revenue*, 987 S.W. 2d 331, 335 (Mo. banc 1999). By giving an advantage to drivers who avoid apprehension, adopting such a rule would conflict with the various state policies, such as the policy of discouraging drivers from leaving their vehicles after an accident. § 577.060, RSMo. 2000. The rule actually blesses those who evade capture, giving drunk drivers an incentive to flee.

Again, there may be a point – perhaps a delay of many hours – at which delay alone is enough to deprive an officer of probable cause to believe that a person who admits to driving and is clearly intoxicated was driving while intoxicated. And there are certainly facts that would, if presented to the officer before the arrest, require him to consider and perhaps investigate the possibility of post-accident intoxication. But the brief interval here, without any evidence that Swanberg, Bright, or any other witnesses told Trooper Windle what they later told the circuit court, is insufficient to defeat the finding of probable cause.

CONCLUSION

For the reasons state above, the decision of the circuit court should be reversed, and the decision of the Director should be reinstated.

Respectfully submitted,

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Certificate of Service

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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 3,329 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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